

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF WASHINGTON
 3 AT TACOMA

4 UNITED STATES OF AMERICA,)	Docket No. CR05-5828FDB
5 Plaintiff,)	Tacoma, Washington
6 vs.)	March 3, 2008
7 BRIANA WATERS,)	VOLUME 15
8 Defendant.)	

10
 11 TRANSCRIPT OF PROCEEDINGS
 12 BEFORE THE HONORABLE FRANKLIN D. BURGESS
 SENIOR UNITED STATES DISTRICT COURT JUDGE, and a Jury.

13 APPEARANCES:

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25 Proceedings recorded by mechanical stenography, transcript
 produced by Reporter on computer.

1 MONDAY, MARCH 3, 2008 - 9:30 A.M.

2 * * *

3 (Jury not present.)

4 THE CLERK: This is in the matter of United States
5 versus Briana Waters CR05-5828FDB.

6 Counsel, please make an appearance for the record.

7 MR. FRIEDMAN: Good morning, Your Honor, Andrew
8 Friedman and Mark Bartlett for the United States.

9 MR. BLOOM: Robert Bloom and Neil Fox for Briana
10 Waters who's present.

11 THE COURT: All right. I guess the matter of some
12 concern was that the fire up there in Woodinville, where the
13 ELF seems to be taking credit for, was on the news this
14 morning.

15 You were at the door, I guess, before the courthouse
16 opened, so let me hear now your presentation on this, and what
17 actions if any this calls for.

18 MR. BLOOM: Sure, I will try to be brief, because
19 actually I would like to get something done with the jury as
20 soon as possible.

21 It was the lead story, somebody called me at 6:00 a.m. and
22 I was watching television, it was the lead story on all the
23 local channels, they had helicopter pictures of the very
24 serious fire, several houses in a wealthy development. They
25 expressly mentioned ELF, they showed a banner, supposedly

1 prepared by ELF, taking credit.

2 Briana Waters was mentioned by name several times. The
3 case was mentioned several times. Devices were mentioned
4 several times. Needless to say, this is not in any way
5 helpful to Briana Waters. Indeed, we think it could be
6 disastrous insofar as it may affect the deliberations of this
7 jury.

8 I'd like to later go into the possibilities of who might
9 actually have been responsible for this, but I don't want to
10 do that now; I don't want to take the time to do that now.

11 I would simply -- our first request is that the Court
12 speak to each of the jurors in court, individually, and ask if
13 they are aware -- I would do it and request it be done in as
14 neutral language as possible -- if there's a news story that
15 might -- not related to this case, but might impact you; are
16 you aware of it. And then depending on what the juror says --

17 THE COURT: Read that to me again what you are
18 saying.

19 MR. BLOOM: If there is a news -- there's a news
20 story that broke this morning.

21 THE COURT: I understand you are saying something
22 should be said to the jury in a neutral sort of way; say that
23 again.

24 MR. BLOOM: And the language to the effect that
25 there's a news story this morning.

1 THE COURT: I understand you are going all over that
2 again. I understand the news story.

3 Tell me the language you are saying.

4 MR. BLOOM: That's what I was doing. Do it your way.
5 I am proposing language. The language is: "There's a news
6 story this morning that might impact your deliberations, are
7 you aware of anything? I wasn't rearguing, I was actually
8 giving you the language, or proposed language, I should say.

9 THE COURT: You are saying there's a new story this
10 morning that might affect your deliberations. That's it.

11 MR. BLOOM: Are you aware of anything?

12 THE COURT: All right.

13 MR. BLOOM: Something like that.

14 THE COURT: Okay. All right.

15 MR. BARTLETT: Two things, Your Honor. First of all,
16 I think we need to look into this. Mr. Bloom is suggesting
17 that each juror be brought out individually. That may be what
18 the Ninth Circuit suggests and recommends in this situation, I
19 don't know. But I think we need to look into that.

20 My initial thought on this was that the juror should be
21 spoken to as a group and be reminded of their instruction,
22 specifically Instruction No. 6, which indicates at subsection
23 4, anything you have seen or heard when the Court is not in
24 session is not evidence, you are to decide the case solely
25 open the evidence received at trial.

1 That was what the government was going to recommend, but I
2 would like an opportunity to look into what does the Ninth
3 Circuit recommend.

4 I don't know, with regard to Mr. Bloom's suggestion, what
5 is the next step, if you bring a juror out individually, and
6 ask them have you heard about this story and they indicate
7 yes, well what do we do then.

8 Clearly if they have heard about it, to a certain point,
9 it's a so what.

10 The question really is has this story impacted their
11 ability to be impartial in the case. Before we get into
12 individual jurors questioning, I think we need to look at what
13 the Ninth Circuit recommends. This is not the first time this
14 type of situation has been brought up.

15 And I might point out to the Court, something the Court
16 might not be aware of: This is not the first time this exact
17 situation has happened with regard to ELF.

18 There was a trial -- the last big trial in the northwest
19 regarding the ELF was the Jeff Lewrs case down in Oregon in
20 March 2001. Mr. Lewrs had been accused and been convicted of
21 burning a number of SUV's at the Romania car dealership.
22 During the trial there was a second arson at the Romania car
23 dealership virtually identical to what's going on here, so
24 this is not a total surprise to the United States.

25 THE COURT: What I am hearing here, guess what I am

1 hearing from the two of you something should be said to the
2 jury and of course the fashion in which it would be said. Is
3 that a consensus.

4 MR. BLOOM: I agree the juror says I haven't heard
5 anything, we should thank the juror and bring in the next one.

6 THE COURT: I understand your position you think I
7 should do it individually.

8 MR. BLOOM: Yes.

9 THE COURT: And you are saying no, it shouldn't be.
10 What I am trying to get at, and I will probably do
11 something and I will tell you what I am going to do when I
12 think about it a little bit, I want to get your positions
13 first. And then I will tell you what I am going to do. And
14 that's what you are going to have to live with, both of you,
15 whatever that is.

16 There's one step beyond that, I suppose, and that's this:
17 Let's say whatever fashion it is asked, and the answer becomes
18 no, I can't set that aside.

19 MR. BARTLETT: It's like I said Your Honor, at this
20 point, I do not know what the Ninth Circuit recommends.

21 As I stand here off the top of my head, I would tell the
22 Court I strongly would object to individual questioning. I
23 would recommend the Court give a general admonition, that of
24 course they are just to consider the case with regard to the
25 evidence they heard inside in courtroom and they are to ignore

1 any outside news articles, but I don't know the law. I
2 haven't had a chance to look into it and in response to my
3 second question, what if the question is asked in any fashion,
4 and then the next question is can you set this aside and
5 decide this case solely on what you've heard here.

6 Say it comes in that fashion, and somebody says no, I
7 can't. I want a respond from both of you on that.

8 MR. BLOOM: I think as to that question once we hear
9 that, that juror should go back in the jury room and we should
10 discuss it on each of our positions. As to individual, the
11 reason I suggest individual questioning, let's say some jurors
12 have not heard of it, and now they hear of it with a general.

13 THE COURT: If they haven't heard, I won't worry
14 about the ones who haven't heard. Those are the easy ones.
15 It's the mind set of the ones that might have heard something.

16 MR. BLOOM: Sure.

17 MR. BARTLETT: I am looking for an opportunity to go
18 down and look at the law, Your Honor. I do not know what the
19 Ninth Circuit recommends.

20 THE COURT: Well, I think I have a pretty good idea
21 as to how to handle this. I just want to get you on the
22 record as far as I can. If they say something in that fashion
23 to my last question, then I will send them back in.

24 MR. BLOOM: I am just concerned about time, I don't
25 want them deliberating further.

1 THE COURT: They are not deliberating. They are not
2 deliberating.

3 MR. BLOOM: Okay, that resolves my concern.

4 THE COURT: When this was coming on the docket, they
5 were shut down.

6 I want to gather a thought here and then I will tell you
7 how I am going to handle this.

8 MR. BLOOM: Thank you.

9 THE COURT: Of course, I will come back out here, so
10 if any of you have any input as I come back out and you can do
11 that quickly I will listen to whatever you might have to add.
12 Okay we are at recess.

13 (Brief recess.)

14 THE COURT: All right, you may be seated.

15 I have thought about this matter in terms of addressing
16 it, and my conclusion is this -- and then I will have you
17 speak for the record if you'd like to -- is that the jury
18 should be called in and they should be spoken to as a group,
19 as I process it, when I voir dired the jury, I will be putting
20 this to them as a whole, not individually, and I will ask them
21 a question along this line: That there's been a news story
22 this morning that could possibly influence your deliberations.
23 Then I will tell them what I had instructed them to do and
24 what they have been -- and their responsibilities, and the
25 admonitions I have been giving to them as they go about their

1 business from day to day.

2 Then the final question I will ask them, any of them won't
3 follow the instructions as I have given to you about this
4 case, any of them won't decide the case based on how I have
5 instructed them.

6 If they won't do that, I suppose somebody will tell me
7 they won't do that. Then that's probably the best approach
8 that I see in terms of neutrally giving it. If we see no
9 hands, then they will go back and do their job.

10 That's my position. You can make any record beyond that
11 you care to. I am not seeing anything else I want to add to
12 that.

13 MR. BLOOM: I respectfully disagree. I think it is
14 important, a story of this magnitude, where I personally heard
15 Ms. Waters name mentioned on at least two of the local
16 channels, said the jury is out deliberating. And more. That
17 it really is important to get from each juror what he or she
18 has heard, so that we can, the Court can really hone in on
19 what obviously is a big story. It's the lead story, fires,
20 pictures, everything. It's just -- it's not just a casual
21 mention, and I really would, again, repeat that I think we
22 have to really inquire of the jurors what if anything they
23 have seen or heard.

24 THE COURT: All right. I understand what you are
25 saying. Mr. Bartlett.

1 MR. BARTLETT: I agree with the Court's position; it
2 is not important whether they have heard or not heard. It's
3 important whether they have heard anything that would impact
4 their ability to be impartial and the Court is going to
5 inquire of that.

6 THE COURT: That's what I think is the essential
7 thing. You've made your record, just like there's been
8 reports in the paper about this case, name's been in the paper
9 about all of those things. It's not that these names haven't
10 appeared anywhere, it's in terms of whether it affect them
11 making a decision.

12 That's my concern. That's what I am trying to avoid.

13 So with that, we'll bring the jury in, and then I will
14 deal with this in the fashion I have said. You've had your
15 record and we'll go from there.

16 All right. Bring them in.

17 (Jury present.)

18 THE COURT: All right. You may be seated.

19 Good morning to you. There's been a news story this
20 morning on the news that could possibly influence or affect
21 your deliberations. The Court has instructed you on your
22 duties and responsibilities as jurors, and admonishing you as
23 you go home from day to day and all of that.

24 Any of you now heard anything about this that you cannot
25 set aside, or would it influence your deliberations here;

1 anybody heard anything that would be different than the
2 instructions I have given you as to what evidence you are to
3 take to decide this case? Anybody that can't do that?

4 (No hands go up.)

5 THE COURT: All right. Then your instructions are
6 you are to follow the law as I have given it to you and carry
7 that out and perform that function in that fashion.

8 So now you will go back to the jury room and begin your
9 deliberations.

10 (Jury departed at 10:20 a.m. to resume deliberations.)

11 THE COURT: All right. You may be seated.

12 We will be at recess. I don't know if there's anything
13 else to be said about that. The other question that I
14 mentioned, didn't come up, so we'll see what happens.

15 You made your record.

16 MR. BLOOM: I want to say the following, given the
17 court's approach, we are very much in the dark, of course, as
18 to -- there were a couple nods from the jurors, suggesting
19 that they were -- at least those jurors were aware of the
20 story. We are in the dark here now and we have to contemplate
21 whether or not we wanted to make a motion for mistrial. We
22 really have no information, because there has been no
23 exploration with each or any of the jurors.

24 So, we have that quandary. I want to discuss it with
25 cocounsel and Ms. Waters, and that's our position.

1 THE COURT: I think you made your record. So you can
2 use it anyway, but that's the court's answer to that.

3 MR. BARTLETT: For the record, Mr. Bloom is free to
4 put on the record whatever he wants. The only nodding I saw
5 from this juror was at the end when you said can you be fair
6 and impartial and put aside anything else and follow the law;
7 those are the only times I saw jurors nod.

8 THE COURT: You both saw the accident, whatever.
9 Okay. We will be at recess. I will have you remain within 15
10 minutes of the courthouse so I can get you up here in 15
11 minutes if need be. We are at recess.

12 THE CLERK: All rise, Court is in recess.

13 (Court recessed at 10:20 a.m.)

14

15 (Back in court at 10:40 a.m..)

16 THE COURT: All right. You may be seated.

17 Mr. Bloom.

18 MR. BLOOM: Yes, we move to declare a mistrial for
19 the following reasons: Given the approach that the Court
20 chose to take with regard to addressing the jury, we are left
21 with no idea what each of the jurors has heard, and seen. We
22 know that in connection -- I watched for at least two hours
23 this morning, that it would be the television coverage on all
24 the local television channels, and I know that Briana Waters
25 name was absolutely mentioned. The fact that the trial is

1 happening. One of the channels said that she testified last
2 week. Another said that the jury is deliberating. And there
3 was more, literally every story I read after -- I am sorry,
4 saw after the first few mentioned this case.

5 This event, this arson at this development is in no way --
6 can do anything -- the coverage can do anything but harm
7 Briana Waters.

8 This is -- for one thing, it appears to be the first arson
9 in seven years for which the Earth Liberation Front has taken
10 credit.

11 It's fearful, would make the jurors fearful -- this is
12 different from just a story about the case; this is different
13 quality, quantitatively and qualitatively; this is a major
14 story; this is part of the fabric of the community, and it's a
15 story so large and so pervasive that there's no way that the
16 jurors could have avoided having heard about it and been
17 impacted by. It's compelling.

18 The footage of the flames was very frightening. They
19 talked about there were devices found, I think there was at
20 least one device that it was said did not work, and I think
21 the phrase that was used by the newspaper person was it's
22 solid gold, or a gold mine, I think was the phrase for
23 investigators. They talked about FBI investigators, ATF
24 investigators, fire fighters; they interviewed the fire chief
25 in the area, said it was definitely arson.

1 He particularly referred to the Earth Liberation Front,
2 actually first called it ALF, and then the person interviewing
3 him said Earth Liberation Front. At that time they showed on
4 the screen a white sheet which was scrolled something like
5 "Built green? Nope, black!" Then some other legend and then
6 off to the lower left it says "ELF."

7 So we really are dealing with a major event here and I
8 would offer for purposes of this motion, the exhibit that
9 Mr. Fox has prepared, A-219, to be made part of the record.
10 The prosecution has been given copy of it.

11 THE COURT: Was that the copy you provided the Court
12 involving the newspaper accounts?

13 MR. BLOOM: It is newspaper accounts, but I think the
14 print copies of the newspaper were probably not available at
15 the time. So this was all taken from the Internet, although
16 it does refer to the Seattle Post-Intelligencer, the Seattle
17 Times. It is from their web sites as opposed to the actual
18 print.

19 THE COURT: You are talking about making it part of
20 this motion for this record. All right. Any objection to
21 that?

22 MR. BARTLETT: No, Your Honor.

23 THE COURT: All right. Then the clerk will file it.

24 MR. BLOOM: This is definitely not to go to the jury.

25 THE COURT: Correct.

1 MR. BLOOM: One last thing I wanted to mention.
2 Mr. Bartlett mentioned this kind of thing is not
3 unprecedented, indeed he is correct in the case of Jeff Lewrs,
4 LEWRS, he was on trial for arson in Oregon. It was, I believe
5 a state case. A mistrial was declared because the attorney
6 passed away, had a heart attack, and as I understand it, on
7 the day the trial was to -- the retrial was to begin and the
8 jury was to be selected, a second arson at the Romania
9 automobile dealership took place and a request was made by the
10 new attorney to delay the trial. The Judge chose not to, and
11 Mr. Lewrs was convicted.

12 What's significant about that event is that the person
13 leaving that arson was a cooperating person who's now a
14 cooperating witness for the United States of America; that
15 would be Mr. Meyerhoff.

16 Indeed, we don't know who was responsible for the fire,
17 the instant fire in Woodinville, but these kinds of things
18 often happen or at times happen where provocateurs cause the
19 event to happen.

20 We also know at least one cooperating witness, who has a
21 history of being a serial arsonist, is not incarcerated at
22 this time, and I need not mention names, I think the Court
23 knows to whom I refer.

24 And as I say, this is no way to the advantage of
25 Ms. Waters. Quite the contrary.

1 So we are forced to make this motion for mistrial, despite
2 the fact that we would like this jury to decide the case.

3 THE COURT: All right. Response?

4 MR. BARTLETT: Your Honor, we obviously oppose it. I
5 think the Court made the critical inquiry which is not whether
6 there was a story this morning -- to clarify, the article with
7 regard to the Seattle PI and the Seattle Times were from the
8 website. There was nothing in the paper, if someone were to
9 pick up the hard copy this morning. The Court made the
10 inquiry whether they heard anything outside that would affect
11 them. All of them indicated they had not. That is the
12 critical information.

13 I will say this, Your Honor, we are in federal court, for
14 Mr. Bloom to stand up and imply that agent provocateurs
15 somehow set up and instigated this arson, I think goes beyond
16 the bounds even for Mr. Bloom, which are pretty broad bounds.

17 If he wants to stand up in open Court and accuse the
18 government of somehow arranging this arson, he better have
19 something more than his own paranoid delusions.

20 MR. BLOOM: Well, I didn't get personal and I won't
21 get personal, but I have some experience with cases in which
22 agents provocateur --

23 THE COURT: I don't want to sit here and hear about
24 the two of you as to where you might be on one side or the
25 other on this particular issue. The point is, you are making

1 a motion for a mistrial, I think I have given you adequate
2 time to state those reasons.

3 MR. BLOOM: Yes.

4 THE COURT: So, I will say, I have instructed the
5 jury, I had them back in here. My position on this is the
6 same, it's unchanged.

7 I don't see any reason to talk to the jury any more about
8 it.

9 So I am denying the mistrial, but the record is made.

10 MR. BARTLETT: I should clarify, Your Honor, there
11 has been an arson, approximately once a year throughout the
12 last five years, that has been taken credit either by signs
13 left there or by web sites in the Western District of
14 Washington.

15 THE COURT: All right we are in recess.

16 THE CLERK: All rise, Court is in recess.

17 (Court recessed at 10:50 a.m. pending further
18 deliberations.)

19 (Back in open court at 4:30 p.m.)

20 THE COURT: All right. You may be seated.

21 Good afternoon.

22 MR. BLOOM: We have a very brief request of the
23 Court. I am informed that CNN, today, had this fire as the
24 lead story, and in it they talked about the fire fighters
25 didn't want to go into certain of the buildings, because they

1 feared it might be booby trapped. They talk about terrorism.
2 They talked about eco-terrorism.

3 So, as a result, and I also hear that, or I imagine there
4 will be a lot of local coverage on local news channels as well
5 as national, so we would ask the Court to instruct the jury,
6 please, based on Ms. Waters Fifthth and Sixth Amendment
7 rights, that they should not watch or listen to radio, watch
8 television, or read any newspaper accounts at all today and
9 tomorrow.

10 Thank you.

11 THE COURT: All right. You are talking about reading
12 any accounts about this case.

13 MR. BLOOM: I would say not at all. It appears that
14 it's so pervasive that if they wind up watching the news at
15 all or listening to the news on the radio, or picking up the
16 newspaper, it is going to be front page and top story stuff.
17 So, if they watch it at all I think they will be exposed to
18 it.

19 THE COURT: Well, you are asking me to perhaps take
20 them out of the real world. I know what my normal instruction
21 would be. Anything else? I think something should be said to
22 them, but whether to take it to that extent becomes one thing.

23 I don't know who all talks to the newspaper. I rather
24 nobody talk to them about anything until the case is over but
25 I don't always get my wish.

1 Any comment on any of this?

2 MR. BLOOM: That's my request.

3 THE COURT: I understand.

4 MR. BLOOM: That's all.

5 MR. BARTLETT: We have no objection to the Court
6 asking the jury to refrain from looking at newspaper and movie
7 stories tonight and tomorrow.

8 THE COURT: I am hoping they are listening to what I
9 say, too. That's my wish.

10 We are ready for them? Bring them in.

11 (Jury present at 4:35 p.m.)

12 THE COURT: All right. You may be seated.

13 Good afternoon. It is my understanding that Martinez, I
14 think it is fair to say you haven't reached a verdict and it
15 is time for you to go home and get a good night sleep and come
16 back tomorrow.

17 PRESIDING JUROR: That's correct.

18 THE COURT: Let me say also, as you go home, as I
19 have been saying throughout this case and before this case
20 started, to not discuss the case, not research anything, do
21 not do anything about this case. You are only to discuss the
22 case and get involved in this case when all of you are in the
23 jury room.

24 I had you in here this morning, to deal with other issues,
25 so I am going to ask you in that regard, to not deal with any

1 TV, any newspapers, anything that would give an account,
2 anything that may influence your decision.

3 So I am asking you, I guess, to avoid watching TV, in case
4 something jumps out at you. If you are not looking at
5 anything, of course you won't see anything.

6 And ask you to act in that way, until this case is over
7 with.

8 I want you to decide this case, as I have indicated,
9 solely from the evidence that's been presented to you here in
10 this courtroom. Everything you need to decide this case has
11 been given to you and you have that information.

12 I want nothing else to come into play as you go into your
13 deliberations in terms of deciding the case.

14 So I will hold you to that, and see you in the morning at
15 9:00. All right.

16 (Jury excused at 4:35 p.m.)

17 THE COURT: All right. You may be seated. We will
18 be at recess until tomorrow. I would ask you the same thing,
19 10:00 would be a time to make contact with the Court. And
20 when you do that, try to stay within 15 minutes of the
21 courthouse. Then we'll proceed in that fashion.

22 Anything else?

23 MR. BARTLETT: Nothing Your Honor.

24 THE COURT: Then we will be at recess.

25 THE CLERK: All rise, Court is adjourned.

1 (The Court recessed to Tuesday, March 4, 2008, at the
2 hour of 9:00 a.m.)

3 * * * * *

4 C E R T I F I C A T E

5
6 I certify that the foregoing is a correct transcript from
7 the record of proceedings in the above-entitled matter.

8
9 /S/ Teri Hendrix _____

May 5, 2008

10 Teri Hendrix, Court Reporter

Date